02-278

COPY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of:	)	
	)	Docket No. _____
Lifetime Entertainment Services, LLC	)	
Petition for Declaratory Ruling to Clarify	)	Accepted / Filed
Scope of Rule 64.1200(a)(3) or, in the	)	
Alternative, for Retroactive Waiver	)	DEC 11 2015

Federal Communications Commission
Office of the Secretary

VERIFIED PETITION FOR DECLARATORY RULING TO CLARIFY SCOPE OF RULE 64.1200(A)(3) OR, IN THE ALTERNATIVE, FOR RETROACTIVE WAIVER

DOCKET FILE COPY ORIGINAL

Peter Karanjia
Adam Shoemaker
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006
(202) 973-4200
Fax: (202) 973-4499
Email: peterkaranjia@dwt.com
Email: adamshoemaker@dwt.com

Sharon L. Schneier
DAVIS WRIGHT TREMAINE LLP
1633 Broadway, 27th Floor
New York, New York 10019
(212) 489-8230
Fax: (212) 489-8340
Email: sharonschneier@dwt.com

Attorneys for Petitioner
Lifetime Entertainment Services, LLC

December 11, 2015

TABLE OF CONTENTS

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of:	)	
	)	Docket No. _____
Lifetime Entertainment Services, LLC	)	
Petition for Declaratory Ruling to Clarify	)	
Scope of Rule 64.1200(a)(3) or, in the	)	
Alternative, for Retroactive Waiver	)	

PETITION FOR DECLARATORY RULING TO CLARIFY SCOPE OF RULE 64.1200(A)(3) OR, IN THE ALTERNATIVE, FOR RETROACTIVE WAIVER

Pursuant to Section 1.2 of the Commission's Rules, Lifetime Entertainment Services, LLC ("Lifetime") respectfully requests that the Commission issue a declaratory ruling clarifying that the restrictions of the Telephone Consumer Protection Act of 1991 ("TCPA")[1] on unsolicited, pre-recorded telephone calls do not cover calls (including unsolicited, pre-recorded ones) providing information about television programing distributed by cable operators and cable programming networks that are intended to reach the cable operator's subscribers who are already entitled to watch such cable programming without having to pay any additional charges. Any such calls are purely informational and thus are neither "commercial" nor "advertising," even if they are listened to by an individual who is not within the intended category of (subscriber-only) recipients. This clarification is consistent with the TCPA's purposes and the Commission's orders implementing that statute. It will also serve the public interest by enabling cable networks (such as Lifetime) to keep cable subscribers who view their programming informed about changes to such programming service. In the event that the Commission declines to grant this relief, it should grant the requested retroactive waiver of its rules described below.

[1] *See* 47 U.S.C. § 227(b)(1)(B).

INTRODUCTION AND SUMMARY

As the Commission is well aware, the volume of TCPA litigation has exploded in recent years. And while some TCPA cases represent legitimate efforts to vindicate the privacy interests the TCPA was designed to protect, many others neither advance the statute's goals nor the public interest. This petition seeking declaratory relief from the Commission arises out of just such an ill-founded case.

In the case at issue, plaintiff Mark Leyse ("Leyse") alleges that, over six years ago, Lifetime violated the TCPA by placing a *single* unsolicited, pre-recorded call to a residential telephone line in order to inform Time Warner Cable ("Time Warner") subscribers in New York City that a popular reality television program – "Project Runway" – had moved from the Bravo cable network to the Lifetime network and could be found at a new channel location. The pre-recorded call was expressly addressed to Time Warner subscribers who were already receiving "Project Runway" as part of their "basic" cable subscription packages. And the call – which neither attempted to market or sell anything – merely informed listeners that "Project Runway" was to premiere its sixth season the next day on a new network (Lifetime, rather than Bravo) at a new channel location (Channel 62 rather than Channel 12 in New York City). Like Bravo, the Lifetime network was (and still is) included in all New York City Time Warner subscribers' cable packages at no additional charge.[2]

Leyse's roommate (Genevieve Dutriaux) was assigned the residential telephone number reached by Lifetime's informational call. The basis for Leyse's lawsuit – for which he has sought class certification – is that he heard Lifetime's 20-second call announcing the "Project Runway" move as a message on Dutriaux's answering machine or voicemail service. An

[2] This is in contrast with premium cable networks such as HBO, which is typically not included in "basic" cable packages (and for which subscribers must pay an additional fee in order to have access to the network).

experienced TCPA litigant, Leyse subsequently re-played the message to his counsel, a seasoned TCPA practitioner, who recorded it.

Consistent with the TCPA's goal of restricting unsolicited, pre-recorded *telemarketing* calls, the statute and the Commission's implementing rules do not impose liability for pre-recorded calls that are neither advertising nor placed for a commercial purpose.[3] As any reasonable listener would have understood, the informational call at issue in Leyse's suit against Lifetime was not advertising and it was not placed for a commercial purpose: Neither Lifetime nor Time Warner stood to profit from the message, which was solely designed to inform existing Time Warner subscribers (and viewers of "Project Runway") that the program was moving to a new channel. Nonetheless, the District Court declined to dismiss Leyse's complaint on that basis, instead construing Commission orders and rules as standing for the categorical proposition that any unsolicited, pre-recorded messages imparting information must be considered commercial advertisements that are prohibited under the TCPA so long as they concern subscription-cable programming (as opposed to broadcast programming). The District Court's reading of language in the Commission's orders not only exposes Lifetime (and others in its position) to costly and burdensome litigation that does not advance the TCPA's purposes, but also disserves the public interest by discouraging cable networks and operators from providing useful and germane information to cable subscribers and viewers of the relevant programming. The Commission should therefore take this opportunity to elucidate that its orders and rules implementing the TCPA do not – and were never intended to – mandate this result.

Lifetime thus urges the Commission to issue a declaratory ruling clarifying that the exemptions from TCPA liability under 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R.

---

[3] *See* 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3)(ii)-(iii) (exempting calls "not made for a commercial purpose" as well as calls made for a commercial purpose that do "not introduce or include an advertisement or constitute telemarketing").

§ 64.1200(a)(3)(ii)-(iii) cover unsolicited informational calls (including pre-recorded calls) made by a cable operator or cable network providing information about a programming service that the intended recipients of the call are already entitled to view for no additional charge beyond their basic subscription fee.[4] Specifically, Lifetime asks the Commission to clarify that the call at issue in Leyse's suit (the "*Leyse* Litigation") and similar calls are not "made for a commercial purpose," and do not constitute an "advertisement" or "marketing" under the Commission's rules and orders. If the Commission declines to issue such a declaratory ruling, Lifetime respectfully requests a retroactive waiver of Section 64.1200(a)(3) of the Commission's rules with respect to the call at issue in the *Leyse* Litigation. Neither the Commission's goals nor the public interest is served by subjecting Lifetime (and potentially other cable networks) to lawsuits from plaintiffs who have suffered no actual harm.

BACKGROUND

Petitioner operates the Lifetime® cable television network.[5] Its programming includes original scripted series, reality series, and movies, as well as syndicated programming that initially aired on network television.[6] One of the popular programs that run on the Lifetime channel is "Project Runway," an award-winning reality show featuring a clothing design competition.[7] In its first five seasons, "Project Runway" was telecast on the Bravo cable channel (which is owned by NBC Universal and has no affiliation with Lifetime). Before its sixth season, "Project Runway" moved to the Lifetime channel, where it began airing on August 20,

---

[4] As explained below, this lack of any actual or potential pecuniary gain to the cable operator or network is precisely what distinguishes the calls from "commercial" calls or "advertising" under the Commission's orders.

[5] *See Leyse v. Lifetime Entm't Servs., LLC*, No. 1:13-cv-05794-AKH, ECF No. 66 (S.D.N.Y. May 15, 2015) ("*Hinzman Decl.*") ¶ 2.

[6] *Id.*

[7] *See Leyse v. Lifetime Entm't Servs., LLC*, No. 1:13-cv-05794-AKH, ECF No. 65 (S.D.N.Y. May 15, 2015) ("*Powell Decl.*") ¶ 3.

2009.[8] During the relevant period, all Time Warner subscribers residing in New York City received Lifetime as well as the Bravo channel as part of their "basic" cable package (*i.e.*, for no additional charge beyond the all-inclusive subscription fee they were paying).[9]

At approximately the same time that "Project Runway" moved from Bravo to Lifetime, Time Warner repositioned Lifetime from Channel 12 to Channel 62 on its channel line-up in New York City.[10] This channel change affected only subscribers in the New York City area.[11] Lifetime was concerned that Time Warner subscribers in New York City would not know where to find the "Project Runway" Season Six premiere given the very recent channel change. Both Lifetime and Time Warner were particularly concerned about potential audience confusion because Bravo was continuing to televise "Project Runway" reruns from Seasons One through Five.[12]

In mid-2009, Lifetime – in collaboration with Time Warner – attempted to address these concerns, and considered various ways to inform viewers about the impending channel change. Among the options they considered were: sending emails to registered users of Lifetime.com who were in the Time Warner (New York City) footprint; including a "crawl" (or on-screen message) on Time Warner Channel 12 informing viewers that Lifetime had moved to Channel 62; running television commercials announcing the change; including an appropriate "on hold" message that Time Warner subscribers would hear while calling customer service; sending a pre-

---

[8] *Id.*

[9] *See Hinzman Decl.* ¶¶ 12, 14; *see also* note 2, *supra*.

[10] *See Powell Decl.* ¶ 3.

[11] *See Hinzman Decl.* at 15.

[12] *See Leyse v. Lifetime Entm't Servs., LLC*, No. 1:13-cv-05794-AKH, ECF No. 64 (S.D.N.Y. May 15, 2015) ("*Schneier Decl.*") at Ex. U.

recorded message to "cable households"; and displaying information at Time Warner retail locations.[13]

To provide the most comprehensive notice to Time Warner subscribers (thereby minimizing the risk that subscribers would be disappointed when they were unable to tune in to "Project Runway" at its usual location on Channel 12), Lifetime decided to circulate a pre-recorded telephone message intended to reach only those affected by the change: Time Warner subscribers in New York City.[14] As part of their agreement with Time Warner, the cable operator's customers consent to receive information (including pre-recorded calls) about content distributed by Time Warner.[15]

Time Warner provided Lifetime with a list of the 136 zip codes covering the areas in which its New York City subscribers resided.[16] This list was then used to reach the relevant Time Warner subscribers (and other viewers of "Project Runway").[17]

The twenty-second pre-recorded call ("the Call") delivered the following message:

> Time Warner Cable customers, this is Tim Gunn. Do you know that Lifetime has moved to Channel 62? Tune in to Lifetime on Channel 62 tomorrow at 10 p.m. and see me and Heidi Klum in the exciting Season 6 premiere of "Project Runway." The "Project Runway" season premiere tomorrow at 10 p.m., following "The All-Star Challenge." Be there and make it work – only on Lifetime, now on Channel 62.[18]

---

[13] *See Schneier Decl.* at Ex. Z, Ex. AA; *Powell Decl.* ¶ 5; *Hinzman Decl.* ¶ 16).

[14] While the Lifetime channel was also available in New York City to subscribers of competing cable providers (such as RCN), satellite providers (such as DirecTV service) and the then-nascent television service provided by a telephone company (such as Verizon's FiOS service), in 2009, Time Warner Cable's penetration throughout the city was deeper than theirs.

[15] *See Schneier Decl.* at Ex. G.

[16] *See Hinzman Decl.* ¶ 16; *Schneier Decl.* at Ex. EE; *Powell Decl.* ¶ 8.

[17] Leyse has testified that he had no relationship with Time Warner at the relevant time, and that the apartment to which Lifetime's Call was directed had no cable service. *See Schneier Decl.* at Ex. A (Leyse Depo. Tr. at 50-51).

[18] *See Schneier Decl.* ¶ 2.

The uncontroverted record in the *Leyse* Litigation showed[19] that the individuals who created and executed the Call did so with the sole goal of informing Time Warner subscribers who already received "Project Runway" at no additional charge of the channel line-up change on the eve of the show's Sixth Season premiere. It was never their intention to market Lifetime or otherwise encourage listeners to sign up for any new programming service that they were not already entitled to view through this campaign.

Notwithstanding the fact that the Call was designed for the express purpose of informing the cable audience about a change to their service – and had no commercial purpose – Leyse launched a putative class-action lawsuit seeking statutory damages of $500 per call (before trebling).[20] Lifetime received no other complaints about the single call.[21] Leyse never complained about the August 2009 Call prior to filing suit, and waited until August 16, 2013 (three days before the expiration of the four-year statute of limitations) to file his putative class action. Leyse also does not dispute that the Call was solely intended to reach existing Time Warner customers who already had access to "Project Runway."[22] Leyse's alleged harm consists entirely of his hearing the 20-second Call when he re-played it on the answering machine or voicemail associated with Dutriaux's phone number.[23]

After the District Court declined to dismiss the case based on the pleadings,[24] the parties engaged in extensive discovery. Thereafter, in May 2015, Lifetime moved for summary judgment. It argued that the Call heard by Leyse (and the identical calls directed at Time Warner

---

[19] Copies of the declarations of Tracy Barrett Powell and Sara Edwards Hinzman are attached as Appendix A hereto.

[20] *See Leyse v. Lifetime Entm't Servs., LLC*, No. 1:13-cv-05794-AKH, ECF No. 1 (S.D.N.Y. Aug. 16, 2013) ("*Complaint*").

[21] *See Powell Decl.* ¶ 12.

[22] *See Schneier Decl.* at Ex. A (attaching excerpts from deposition of Mark Leyse). *See also* note 17, *supra.*

[23] *See Complaint.*

[24] *See Leyse v. Lifetime Entm't Servs., LLC*, No. 1:13-cv-05794-AKH, ECF No. 17 (S.D.N.Y. Dec. 18, 2013).

subscribers) was neither "advertising" nor made for a "commercial" purpose, and hence could not give rise to liability under the TCPA.[25]

In September 2015, the District Court denied Lifetime's motion for summary judgment (while simultaneously denying Leyse's motion for class certification).[26] As relevant here, the District Court reasoned that, under its reading of the Commission's TCPA orders and rules, even an informational message such as the one at issue in the *Leyse* Litigation is "deemed a commercial advertisement that is barred" under the TCPA whenever it is "provided by a paid-for service."[27] The court understood its decision to be compelled by that Commission precedent. Specifically, the court construed language in the Commission's *2003 Final Rule*[28] and *2005 Final Rule*[29] as setting forth a bright-line rule that pre-recorded calls about a cable program – even including informational calls such as the Lifetime Call – are necessarily "commercial" because cable television, in general and unlike broadcast television, relies on a paid-subscription model.[30]

---

[25] *See Leyse v. Lifetime Entm't Servs., LLC*, No. 1:13-cv-05794-AKH, ECF No. 62 (S.D.N.Y. May 15, 2015).

[26] *See Leyse v. Lifetime Entm't Servs., LLC*, No. 1:13-cv-05794-AKH, ECF No. 96 (S.D.N.Y. Sept. 22, 2015) ("*Leyse Summary Judgment Order*"). Leyse has filed a petition pursuant to Rule 23(f) of the Federal Rules of Civil Procedure with the Second Circuit, seeking permission to appeal from the district court's denial of class certification. *See* No. 15-3495. That appeal is currently pending.

[27] *Leyse Summary Judgment Order* at 7.

[28] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44144, 44162 (July 25, 2003) ("*2003 Final Rule*").

[29] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 70 Fed. Reg. 19330, 19335, 2005 WL 836554 (F.R. Apr. 13, 2005) ("*2005 Final Rule*").

[30] *See Leyse Summary Judgment Order* at 7. The court also relied on an April 11, 2007 letter from former FCC General Counsel Samuel L. Feder to the Acting Clerk of the U.S. Court of Appeals for the Second Circuit in an unrelated case. In that letter, Mr. Feder stated: "The distinction between over-the-air broadcast and a paid-for service thus was the linchpin of the Commission's decision. And it is the only rationale that explains why the Commission treated differently two telephone messages concerning the same programming: a telemarketing message that promotes a free broadcast show is deemed not to address the commercial availability or quality of the programming (and is within the Commission's statutory discretion to exempt it from TCPA restrictions) but a promotion for programming – even the very same programming – provided by a paid-for service is deemed a commercial advertisement that is barred under the statute."

While denying summary judgment, the court nevertheless emphasized that "[n]othing in [its] Order should be construed to prevent Lifetime from" seeking further relief from the Commission concerning its TCPA precedents and rules "as applied to cable programming."[31] Following the court's invitation, Lifetime now seeks relief from the Commission.

DISCUSSION

A. The Commission Should Clarify That the TCPA Does Not Restrict Pre-Recorded Informational Calls from Cable Operators and Cable Programming Networks That Are Intended to Reach Subscribers of the Operator Who Are Already Entitled to Watch the Relevant Programming For No Additional Charge.

Lawsuits such as the *Leyse* Litigation threaten to deter cable operators and programmers from using an effective communication tool (telephonic notifications) to keep subscribers and viewers informed of changes to their services and programs. At the same time, these lawsuits do nothing to further the TCPA's goals of restricting unsolicited telemarketing or otherwise protecting the privacy rights that the TCPA was enacted to safeguard. The Commission should clarify[32] that its precedent and rules do not embody the counterintuitive and sweeping rule that all pre-recorded messages – even informational ones – placed by cable networks must be viewed as "commercial" or "advertising." Specifically, the Commission should clarify that pre-recorded informational calls such as the Call in the *Leyse* Litigation fall within the exemption from 47 U.S.C. § 277(b)(1)(B) for calls "not made for a commercial purpose."[33] Alternatively, if the Commission concludes that such communications do have a commercial purpose, it should

---

[31] *Leyse Summary Judgment Order* at 8.

[32] In other cases, the Commission has issued declaratory rulings to resolve uncertainty, including uncertainty created by judicial decisions. *See, e.g., Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, 24 FCC Rcd. 13994 (2009), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013). As noted above, the court in the *Leyse* Litigation expressed its openness to Lifetime seeking further relief from the Commission.

[33] *See* 47 C.F.R. § 64.1200(a)(3)(ii).

specify that these communications nonetheless fall within the exemption for calls that do "not include or introduce an advertisement or constitute telemarketing."[34]

1. Commission Precedent Supports the Conclusion That a Call That Merely Provides Information About a Service Change Is Not Made for a Commercial Purpose.

The TCPA provides that a pre-recorded call is not prohibited if it is otherwise exempted under the Commission's rules.[35] The statute further provides:

> (2) Regulations; Exemptions and Other Provisions. – The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission –
>
> * * * * *
>
> (B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe –
>
> (i) calls that are not made for a commercial purpose; and
>
> (ii) such classes or categories of calls made for commercial purposes as the Commission determines –
>
> (I) will not adversely affect the privacy rights that this section is intended to protect; and
>
> (II) do not include the transmission of any unsolicited advertisement.

The TCPA expressly excludes from liability noncommercial calls[36] – a term the Commission uses to describe calls that do not present unsolicited advertising – because they do not adversely affect the privacy rights the TCPA was intended to protect.[37] As Congress made clear, it passed the TCPA in response to consumer complaints about telemarketing calls in particular – not in response to generalized complaints about all pre-recorded calls. As Senator

---

[34] *See id.* § 64.1200(a)(3)(iii).

[35] *See* 47 U.S.C. § 227(b)(1)(B).

[36] Similarly, the TCPA does not prohibit the sending of faxes that are not "advertisements." *See* 47 U.S.C. § 227(b)(c) (provision dealing with faxes); 47 U.S.C. § 227(b)(2)(B)(ii)(II) (provision dealing with calls).

[37] *See Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8773 ¶ 40 (1992).

Fritz Hollings explained, "[t]his bill is purely targeted at those calls that are the source of the tremendous amount of consumer complaints at the FCC and at the State commissions around the country – the telemarketing calls placed to the home."[38] In determining whether a call has a noncommercial purpose, and is therefore exempt from the TCPA's prohibitions, the Commission has explained that "application of the pre-recorded message rule should turn, not on the caller's characterization of the call, but on *the purpose of the message*."[39]

The fact that a pre-recorded message is disseminated by a company that is otherwise engaged in commercial activities does not automatically make the message commercial in its purpose.[40] Most commercial activities are conducted for profit, but a profit motive alone does not deprive a company of the protection that the First Amendment affords to informational communications.[41] Moreover, courts have specifically held that "whether the sender will ultimately obtain an ancillary commercial benefit from sending an informational message does not alter this classification" under the TCPA.[42]

The Call in the *Leyse* Litigation (and others like it) should be exempt from the TCPA's prohibition because it was purely informational and did not serve any commercial purpose: Lifetime's intent was simply to inform its audience that, the next day, a popular program would move from one network and channel (already part of the viewer's cable package) to another

---

[38] Telephone Consumer Protection Act of 1991, H.R. Rep. No. 102-317, at 11 (1991), 1991 WL 245201.

[39] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44144, 44162 (July 25, 2003) (emphasis added).

[40] *See Phillips Randolph Enters., LLC v. Adler-Weiner Research Chi., Inc.*, 526 F. Supp. 2d 851, 853 (N.D. Ill. 2007) (fax offering business owners an honorarium to engage in a "research discussion" was not of a commercial nature). Some of the calls specifically described by the Commission as noncommercial – such as those offering bank balances and credit card fraud alerts – inevitably come from commercial enterprises, such as banks and credit card companies. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1838 ¶ 21 (2012).

[41] *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) ("That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.").

[42] *Physicians Healthsource, Inc. v. Janssen Pharms., Inc.*, 2013 WL 486207, at *4 (D.N.J. Feb. 6, 2013) ("'[T]he potential to gain some benefit from sending information,' ... is insufficient to transform an informational message to an advertisement.") (citation omitted).

network and channel location (likewise part of the package). That message did not sell a product or service, nor would any reasonable consumer understand it to market a product or service. It was designed to inform cable subscribers of a change to their *existing* programming service.[43]

The wording of the Call supports no other conclusion. As an initial matter, it was explicitly addressed to existing, not prospective, Time Warner subscribers (*i.e.*, those who already had access to watch "Project Runway," at no additional cost, if they wished to tune into the show). And the plain language of the message relayed during the 20-second Call conveyed only two targeted pieces of information to those existing subscribers: that "Project Runway" had moved to the Lifetime channel, and where and when the show could be found.[44]

The Call did not try to solicit any new customers, nor did it provide information about how new customers might sign up. And the Call gave no direction about how to contact Time Warner (much less Lifetime) to purchase a cable subscription or specific subscription pricing or even how to receive general contact information (such as a telephone number, email address, or web site address).[45] Indeed, it is difficult to imagine that anyone who did not already have a Time Warner cable subscription would have been persuaded to purchase one based on the limited information that a five-year-old television series was moving from one channel to

---

[43] For essentially the same reasons, Lifetime's Call was not a "dual purpose" message – *i.e.*, one that contains both a customer-service and a sales message. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14097-98 ¶¶ 140-42 (2003) ("*2003 Report and Order*"). Calls from mortgage brokers to existing clients offering lower rates, from phone companies regarding new calling plans, and from credit card companies offering overdraft protection – all of which are covered by the TCPA if they are intended to sell the customer new products or services – are entirely different from the message at issue in the *Leyse* Litigation. *Id.* While "such messages may inquire about a customer's satisfaction with a product already purchased," the Commission has long viewed those sorts of calls as largely motivated "by the desire to ultimately sell additional goods or services." *Id.* ¶ 142. Here, by contrast, the Lifetime Call was not (and could not have been) a pretext to sell additional goods or services, as Lifetime does not even sell any goods or services directly to customers.

[44] *See* text of Call, *supra* at 6.

[45] *See id.*

another. In short, by design and "purpose,"[46] the Call provided value only to its intended audience: Time Warner subscribers who already had access to "Project Runway" and could watch it at no additional charge, without any change to their existing cable package. That a non-subscriber (and not even the person assigned the telephone number called) overheard Lifetime's Call – which was intended to reach an existing subscriber – cannot transform the call's informational purpose into a commercial one.[47]

Proposing a commercial transaction to non-Time Warner subscribers also would have made no sense given Lifetime's business model. Lifetime does not sell its programming directly to persons without a cable subscription (or subscription to another programming distributor such as DirecTV). Instead, Lifetime earns its revenues by charging carriage fees to distributors (such as cable, satellite, and telephone companies) for the right to distribute Lifetime's signal to their subscribers and by selling air time to advertisers. As a result, it could not have been attempting to sell a product or service to Leyse or any other non-Time Warner subscriber.

Nor does it make any sense that Lifetime would have sought to increase revenues by touting one particular episode of "Project Runway" *the night before* the season premiere (which was when the Call was made). Under those circumstances, it is fanciful to believe that recipients would have had the time, ability or incentive to sign up and become Time Warner subscribers overnight simply so they could watch the show the next day. No sensible marketer would have launched the Call to drum up new business in the face of these real constraints.

Under any reasonable understanding of the Call, then, it was purely informational and intended exclusively to inform existing Time Warner subscribers (and those "Project Runway"

---

[46] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. at 44162.
[47] *See id.*

viewers entitled to tune into the show without any additional charge) about where, and when, they could find the show's season premiere in light of the channel change.[48]

2. The Commission's Rules and Precedent Also Support a Ruling that Informational Calls Such as Lifetime's Call Are Neither Advertising Nor Telemarketing.

Under Commission rules, even a call with a commercial purpose is not actionable under the TCPA if it does not constitute an unsolicited advertisement.[49] The Commission should clarify that calls of the type at issue in the *Leyse* Litigation are separately exempt from liability because they does not constitute an "advertisement" or "telemarketing."

"Advertisement" is expressly defined in the TCPA as "any material advertising the commercial availability or quality of any property, goods or services."[50] The Commission has explained that a message is an advertisement if "the call is *intended to* offer property, goods, or services for sale either during the call, or in the future."[51] As explained above, because Lifetime's Call was not intended to offer any services for sale, it does not fall within the TCPA.

It is undisputed that Lifetime's intent and purpose in making the pre-recorded Call were strictly informational and did not seek to advertise or market anything. The Sixth Circuit's recent decision of *Sandusky Wellness Center, LLC v. Medco Health Solutions*,[52] fully supports Lifetime's understanding of the Call. There, the Sixth Circuit held that the TCPA does not apply to messages (in that case, informational faxes) that do not promote goods or services for sale in

---

[48] Prior to the amendments which went into effect on October 16, 2013, the TCPA provided an exemption for pre-recorded telemarketing calls to residential lines if the recipients had an established business relationship with the caller. Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227(a)(3)(B)). Although Leyse might not have had an established business relationship with Lifetime or with Time Warner Cable, other potential class members who were Time Warner Cable subscribers had an established business relationship with that cable provider. Moreover, pursuant to their subscriber agreements, Time Warner Cable customers consented to receive telephone calls about Time Warner programming. *See Schneier Decl.* at Ex. G.

[49] 47 U.S.C. § 227(b)(2)(B)(ii); 47 C.F.R. § 64.1200(c)(2) (1992).

[50] 47 U.S.C. § 227(a)(5).

[51] *See 2003 Report and Order* ¶142 (emphasis added).

[52] 788 F.3d 218 (6th Cir. 2015).

the hope of making a profit: Just like the Call in the *Leyse* Litigation, the faxes in *Sandusky* (which included a "formulary update" relevant to drug prescriptions) were "not sent with hopes to make a profit, directly or indirectly, from [the defendant] or the others similarly situated."[53] Rather, they simply conveyed information, and thus "lack[ed] the commercial components inherent in ads."[54]

Likewise, in *Alleman v. Yellowbook*, the court found that a pre-recorded call to a consumer asking whether he had received a free telephone directory was not advertising under the TCPA.[55] In dismissing the case for failure to state a claim, the District Court explained:

> [T]he call contains no [indication] that it is "motivated in part by the desire to ultimately sell additional goods or services . . . either during the call, or in the future." *2003 Order*, at ¶ 42. It does not "promote" the sale of goods or services, as the sale of goods or services is not described or even contemplated. *See 2005 Order*, at ¶ 39. Further, it does not seek people to help sell or market the Yellowbook directories, *see 2003 Order*, at ¶ 142, or describe their "quality," *2005 Order*, at ¶ 39. On its face, the call is not part of a marketing campaign to sell additional products or services. Its intent is to confirm the caller's receipt of the free Yellowbook directory. The fact [that] Yellowbook contains advertisements does not change the call's facial character.

2013 WL 4782217, at *6.

Similarly, Lifetime's Call on its face did not offer any goods or services for sale (either during the call or in the future). It was addressed to existing Time Warner subscribers, who could view "Project Runway" simply by tuning in to Lifetime—a network *already* included in their cable packages. A prospective Time Warner customer, after hearing the call, had no more information about how to subscribe to the cable operator's services than before. Accordingly, a

---

[53] *Id.* at 221-22.

[54] *Id.* at 222. In the *Leyse* Litigation, Leyse was unable to point to a single case in which a court found that a call similar to Lifetime's Call could be actionable under the TCPA. As detailed below, the sole reason Leyse survived summary judgment was the District Court's overly broad reading of language in the Commission's precedent and rules.

[55] *Alleman v. Yellowbook*, 2013 WL 4782217 (S.D. Ill. Sept. 6, 2013).

ruling confirming that such a call is not an "advertisement" or "telemarketing" would be fully consistent with the Commission's orders and rules construing these terms.

3. The Commission Should Clarify that a Caller's Identity as a Cable Operator or Cable Programming Network Does Not Preclude a Finding that an Informational Call Is Exempt from the TCPA's Restrictions.

In its ruling denying Lifetime's motion for summary judgment in the *Leyse* Litigation, the District Court viewed itself as compelled to find that Lifetime's Call was an actionable commercial call under the TCPA in view of language in the Commission's orders and rules distinguishing between broadcast television and cable subscription services in the TCPA context. As described above (*see* p. 8 & notes 28-30, *supra*), the court focused on a single sentence in the Commission's *2003 Final Rule* which stated (without further elaboration) that: "[M]essages that encourage consumers to listen to or watch programming, including *programming* that is retransmitted broadcast programming *for which consumers must pay* (*e.g.*, cable, digital satellite, etc.), *would be considered advertisements* for purposes of our rules."[56] The court contrasted that statement (which it understood to set forth a blanket rule that all unsolicited calls about cable programming must constitute commercial "advertising") with the statement in the *2003 Report and Order* that: "[I]f the purpose of the message is merely to invite a consumer to listen to or view a *broadcast*, such message is permitted under the current rules as a commercial call that '*does not include the transmission of any unsolicited advertisement*' and under the amended rules as 'a commercial call that does not include or introduce an unsolicited advertisement or constitute a telephone solicitation.'"[57]

---

[56] *2003 Final Rule* at 44163 (emphasis added); *see also* note 30, *supra* (quoting letter to U.S. Court of Appeals for the Second Circuit from former FCC General Counsel).

[57] *See 2003 Report and Order* ¶ 145 (citation omitted). A subsequent Commission order reiterated the same statement without any further explanation. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 20 FCC Rcd. 3788 (2005) ("*2005 Report and Order*").

The Commission should clarify that its prior rulings do not create a categorical rule that all unsolicited, pre-recorded calls made by cable operators or cable networks must be deemed "advertising" that is subject to TCPA liability, even though *identical* calls placed by broadcast networks would not be. At a minimum, the Commission should explain that where – as with Lifetime's Call – the calls are purely informational and are intended to reach only existing cable subscribers (who are already entitled to watch the cable programming at issue for no additional charge), the calls are not "advertising" and therefore are exempt from the TCPA.

First, none of the materials cited by the District Court in the *Leyse* Litigation (including the *2003 Final Rule*, *2003 Report and Order*, *2005 Report and Order*, and opinion of the former FCC General Counsel) considered informational calls directed at existing subscribers – the issue here. Thus, even if the statements in those authorities could be construed as covering the present situation (an overly expansive and hyper-technical reading), they were not intended to sweep so broadly.

Second, regardless of whether a bright-line distinction between telephone calls directed to broadcast viewers as opposed to cable viewers even made sense in 2003, no such distinction makes sense now. Twelve years ago, when the Commission issued the *2003 Final Rule*, only 16% of American television households received their television programming free over the airwaves, while 84% received television programming – both broadcast networks like NBC and cable networks like Lifetime – using a pay service. By 2015, the percentage of American TV households receiving television programming over the airwaves had dropped even further, from 16% to 9.8%, while approximately 90% of households subscribe to some form of pay-television service.[58] As the Second Circuit noted in 2010, relying on data from the Commission, "cable

[58] *See In the Matter of Annual Assessment of the Status of Competition in the Mkt. for the Delivery of Video Programming*, 30 FCC Rcd. 3253, ¶¶ 8, 135 (2015) ("*Sixteenth Video Competition Report*"); Press Release,

television is almost as pervasive as broadcast … and most viewers can alternate between broadcast and non-broadcast channels with a click of their remote control."[59] This trend of convergence has only become more pronounced in the ensuing years. Today, cable television and broadcast television are functionally identical from the viewer's perspective.[60] And the single remaining difference – that cable viewers pay for programming while broadcast viewers do not – is irrelevant to the TCPA's purpose of protecting consumer privacy interests. That distinction is also doubly irrelevant to the fact pattern addressed in this petition for declaratory ruling – *i.e.*, situations in which a cable operator or cable network makes unsolicited and pre-recorded informational calls that are intended to reach only subscribers of the operator *who are already entitled to watch the cable programming at issue for no additional charge*. In this situation, there is no reason to believe that the privacy rights protected by the TCPA are any more adversely affected by a call from a cable operator than the identical call from a broadcaster.[61]

Leichtman Research Group, More than Five of Every Six TV Households Subscribe to a Pay-Tv Service (Sept. 2, 2014) (*available at* http://www.leichtmanresearch.com/press/090214release.html).

[59] *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 325 (2d Cir. 2010) (citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd. 542, 546 ¶ 8 (2009)), *vacated and remanded*, 132 S. Ct. 2307 (2012).

[60] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 533-34 (2009) (Thomas, J., concurring) (noting that "traditional broadcast television and radio are no longer the 'uniquely pervasive' media forms they once were. For most consumers, traditional broadcast media programming is now bundled with cable or satellite services."). Given the growth of pay-TV services, the premise that broadcast television should be treated as "free" in this context also makes little sense. As the Commission has recently recognized, while "[b]roadcast television is free to consumers who receive it over-the-air," "about 90 percent of all television households receive broadcast stations from a [pay-TV distributor]," thus "*most consumers indirectly pay for broadcast stations* as part of their [video distributor] service fees." *Sixteenth Video Competition Report*, 30 FCC Rcd. 3253 at ¶ 172 (emphasis added).

[61] Particularly in light of these present market conditions, perpetuating any such distinction based on the identity of the speaker would also violate the First Amendment. *See Fox Television Stations*, 556 U.S. at 533-34 (Thomas, J., concurring); *see also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 659 (1994) ("Regulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns"); *LAPD v. United Reporting Corp.*, 528 U.S. 32, 47 n.4 (1999) ("Our cases have repeatedly frowned on regulations that discriminate based on the content of the speech *or the identity of the speaker*") (citing cases; emphasis added); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual."); p. 11 & note 41, *supra*.

Third, it would be particularly unfair to permit TCPA liability in cases involving calls like the one at issue in the *Leyse* Litigation given that the Commission never sought comment on the dicta on which the District Court relied for its understanding that the Commission recognizes a blanket ban on such messages when transmitted by cable (rather than broadcast) networks. The Commission's proceeding culminating in the *2003 Final Rule* did not provide sufficient opportunity for comment from cable operators, programmers, and other entities that would ultimately be subject to its rules. Instead, the Notice of Proposed Rulemaking only sought comment on "prerecorded messages sent by radio stations or television broadcasters that encourage telephone subscribers to tune in at a particular time for a chance to win a prize or some similar opportunity."[62] Cable (as opposed to broadcast) television was not even mentioned in the Notice at all. The Commission thus gave no indication that it had any interest in examining pre-recorded messages from cable programming services; whether there are any material differences between cable and broadcast programming; and, most importantly, whether any such differences (even assuming they exist) matter in the TCPA context. Nor did the FCC seek comment on the distinction between broadcast and cable programming before issuing its *2005 Report and Order* and related rules.[63]

In light of this context and the shift in the industry described above, it would be particularly unfair and unprincipled to allow a blanket prohibition on all telephonic outreach by all "paid-for" services. The Commission should therefore clarify that unsolicited, pre-recorded calls of the type at issue in the *Leyse* Litigation are not barred by the TCPA merely because the caller is a cable operator or cable network as opposed to a broadcast network. Such a ruling

---

[62] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking, 17 FCC Rcd. 17459, 17478-79 ¶ 32 (2002).

[63] *See 2005 Report and Order* and the *2005 Final Rule*.

would also ensure that the TCPA and the Commission's implementing orders are interpreted in a manner consistent with the statute's purpose and constitutional requirements.

B. In the Alternative, Lifetime Should Be Granted a Retroactive Waiver.

If the Commission declines to issue a declaratory ruling as discussed above, Lifetime respectfully requests a retroactive waiver of Section 64.1200(a)(3) for the Lifetime Call.

Section 1.3 of the Commission's rules permits the Commission to grant a waiver of its rules for good cause shown, and the Commission should grant a waiver if (after considering all relevant factors) doing so is in the public interest. Among other things, a waiver is appropriate where "[t]he underlying purpose of the rule(s) would not be served" or "unique or unusual factual circumstances" mandate a waiver to avoid an application of the rule that would be "inequitable, unduly burdensome or contrary to the public interest."

Here, a waiver is appropriate for both reasons. As the discussion above shows, the conclusion that the Call at issue in the *Leyse* Litigation should not give rise to liability under the TCPA is consistent with the statutory purposes (which are aimed at restricting unwanted telemarketing) and Commission precedent (which confirms that the Call was noncommercial and does not constitute "advertising"). *See* pp. 10-16, *supra*. Moreover, allowing cable programmers such as Lifetime to be subjected to the massive burden and cost imposed by inapt TCPA cases such as the *Leyse* Litigation would be contrary to the public interest by discouraging the flow of useful information that is intended to reach cable subscribers and viewers of the relevant cable programming. *See* p. 19, *supra*. At a minimum, then, a retroactive waiver is warranted.

CONCLUSION

For the reasons stated above, the Commission should issue a declaratory ruling clarifying that the restrictions of the TCPA on unsolicited, pre-recorded calls do not cover informational telephone calls (including unsolicited, pre-recorded ones) from cable operators and cable networks that are intended to reach the cable operator's subscribers who have access to watch the relevant programming for no additional charge under their basic cable subscriptions. In the alternative, the Commission should grant a retroactive wavier of Section 64.1200(a)(3) for the Call at issue in the *Leyse* Litigation.

Respectfully submitted,

/s/ Peter Karanjia

Peter Karanjia
Adam Shoemaker
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20006
(202) 973-4200
Fax: (202) 973-4499
Email: peterkaranjia@dwt.com
Email: adamshoemaker@dwt.com

Sharon L. Schneier
DAVIS WRIGHT TREMAINE LLP
1633 Broadway, 27th Floor
New York, New York 10019
(212) 489-8230
Fax: (212) 489-8340
Email: sharonschneier@dwt.com

Attorneys for Petitioner
Lifetime Entertainment Services, LLC

December 11, 2015

DECLARATION OF TRACY BARRETT POWELL

Pursuant to 28 U.S.C. § 1746, I, Tracy Barrett Powell, declare and state as follows:

1. I am Vice President, Distribution Marketing at A&E Television Networks, LLC ("AETN"). AETN is a global entertainment media company with ten distinctive television channels including Lifetime®. AETN officially acquired Lifetime® as of September 15, 2009 as part of its acquisition of defendant Lifetime Entertainment Services, Inc. ("Lifetime"). I submit this declaration in support of Lifetime's Verified Petition for Declaratory Ruling or Retroactive Waiver ("Petition").

2. I have read the Petition and verify that the factual assertions stated within are accurate to the best of my knowledge.

3. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 10 day of December, 2015, in New York, New York.

Tracy Barrett Powell

Appendix A

May 15, 2015 Declarations of

Tracy Barrett Powell and

Sara Edwards Hinzman